**The Indian Child Welfare Act:**

**The Need for a Separate Law**

*By B. J. Jones*

It was not only the high number of children being

removed from their homes, but also the fact that

eighty-five to ninety percent of them were being

placed with non-Indians, that caught the attention

of Congress. Congress was actively promoting the

continued viability of Indian nations as separate

sovereigns and cultures at that time. By enacting the

substantive placement preferences in ICWA—which

require that Indian children, once removed, be placed

in homes that reflect their unique traditional values

(25 U.S.C. 1915)—Congress was acknowledging that

no nation or culture can flourish if its youngest

members are removed. The act was intended by

Congress to protect the integrity of Indian tribes and

ensure their future.

WHEN DOES THE INDIAN CHILD WELFARE

ACT APPLY?

ICWA applies to four types of Indian child custody

proceedings:

1. Foster Care Placements

ICWA applies to the temporary removal of an

Indian child from his/her home for placement in

a foster home or institution, when the parent or

Indian custodian (defined as an Indian person

with custody of the child under tribal or state

law or who has the child pursuant to a parental

placement) cannot regain custody upon demand

(25 U.S.C. 1903[1]). The latter provision exempts

ICWA application from voluntary religious

or school placements, as well as voluntary

placements with private or public agencies where

the parent or custodian can regain custody at

any time. However, ICWA would apply to a

guardianship in which a child is placed with a

nonparent, as this fits the definition of a foster

care placement.

*(Be aware that certain state courts have limited the*

*applicability of ICWA by holding that the law does*

*not apply to proceedings involving the removal of*

The Indian Child Welfare Act (ICWA), which was

adopted by Congress in 1978, applies to child custody

proceedings in state courts involving “Indian”

children—children of Native American ancestry. The

provisions of ICWA represent a dramatic departure

from the procedural and substantive laws that

most states have enacted to govern child custody

proceedings. Because Indian children are treated

uniquely in the legal system, and because there is

an increasing number of court proceedings involving

Indian children, the need for lawyers to understand

ICWA is fast becoming imperative.

ENSURING A FUTURE

A look at history reveals why Congress determined a

special law was needed to protect the rights of Indian

children and their parents. Before 1978, as many as

twenty-five to thirty-five percent of the Indian children

in certain states were removed from their homes and

placed in non-Indian homes by state courts, welfare

agencies, and private adoption agencies. Non-Indian

judges and social workers—failing to appreciate

traditional Indian child-rearing practices—perceived

day-to-day life in the children’s Indian homes as

contrary to the children’s best interests.

In Minnesota, for example, an average of one of

every four Indian children younger than age one was

removed from his/her Indian home and adopted by a

non-Indian couple. A number of these children were

taken from their homes simply because a paternalistic

state system failed to recognize traditional Indian

culture and expected Indian families to conform to

non-Indian ways.

Other children were removed because of the

overwhelming poverty their families were facing.

Although, admittedly, poverty creates obstacles to

child rearing, it was used by some state entities as

evidence of neglect and, therefore, grounds for taking

children from their homes.

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*an Indian child from a non-Indian family (e.g., a*

*case that involves an Indian child raised by a non-*

*Indian mother). Known as the “existing Indian*

*family” exception, this exception has generated*

*some controversy. Refer to your own state’s laws to*

*determine its status in your state.)*

2. Termination of Certain Parental Rights

ICWA applies to any proceeding that may

result in the termination of the parental rights

of the Indian child’s parent or the custodial

rights of the child’s Indian custodian, including

stepparent adoption proceedings and delinquency

proceedings that lead to an attempt to terminate

parental rights. (These generally are not governed

by ICWA.)

3. Pre-adoption Placements

4. Adoption Placements

ICWA applies to proceedings that lead up to and

culminate in the adoption of an Indian child. It

imposes an obligation on both public and private

adoption agencies to comply with its provisions.

ICWA does not apply to custody disputes between

divorcing parents or custody disputes related to any

other proceedings, nor does it apply to delinquency

proceedings involving an Indian child who has

committed an act that would constitute a crime if

it were committed by an adult (except where the

state is using the delinquent act as the grounds for

a termination of parental rights petition). However,

it would apply if the act committed by the child did

not constitute a crime (e.g., an act of truancy or

incorrigibility).

IS THE CHILD AN INDIAN?

To apply the provisions of ICWA to a particular child

custody proceeding, the court must first determine that

the child is an Indian. Much litigation has ensued

over this distinction. ICWA defines “Indian child” as

a child who is a member of a federally recognized

Indian tribe or is eligible for membership in such a

tribe and the biological child of a member (25 U.S.C.

1903[4]). Parties to a state court proceeding must defer

to Indian tribes on questions of membership.

There are a variety of ways Indian tribes determine

membership, ranging from blood quantum

requirements to residency requirements; no set

formula applies to all tribes. At present, there are

more than four hundred Indian tribes and Alaskan

native villages that are recognized by the U.S.

Department of the Interior and, therefore, governed by

the provisions of ICWA. (A list is published annually

in the Federal Register.) Children who are members of

Canadian tribes or tribes that have state-government

recognition only are not governed by the act.

PROCEDURAL RECOGNITION

The provisions of ICWA require that lawyers adhere

to numerous specific procedures. First and foremost,

because the act vests Indian tribal courts with

exclusive jurisdiction over Indian children who live on

Indian reservations (25 U.S.C. 1911[a]), state courts,

with limited exceptions, cannot exercise jurisdiction

over child custody proceedings that involve such

children or children whose custodial parents were

living on a reservation immediately prior to a

foster care or adoption placement. These types of

proceedings must be adjudicated through the tribal

court of the relevant tribe.

If the Indian child lives off the reservation, the state

court may exercise jurisdiction over the child custody

proceeding, but the party invoking the state court’s

jurisdiction must comply with certain procedures: if

the proceeding involves the involuntary removal of

a child, the petitioning party must notify the Indian

child’s tribe and the Department of the Interior by

certified mail of the pendency of the state court action

if the party knows or has reason to believe that the

child is Indian.

When a child’s tribal affiliation is unknown, the party

must notify all tribes that may have some connection

to the child as well as the Department of the Interior,

which may have information that would help

determine the child’s tribal status. If the proceeding

is voluntary—for example, the mother is voluntarily

seeking to terminate her rights so she can place the

child for adoption—notice may not be necessary;

need will be dictated by the court decisions of that

particular jurisdiction.

In situations where notice is required, notice must

be completed at least ten days before the state

proceedings may advance and it must apprise the

tribe of the following: its unconditional right to

intervene in the state court proceeding, its right to

examine all relevant documents, and its right to

request that the start of the proceeding be delayed.

Notice also must inform the tribe of its right, and

the right of the child’s parent or Indian custodian,

to request a transfer of the proceedings to the tribal

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court. The law requires that state courts grant such

requests except when one of the following occurs: one

of the parents objects to the transfer, the tribal court

declines the transfer, or the state court finds good

cause not to transfer.

Much of the case law interpreting ICWA has arisen

from situations in which one of the parties to a

state court child custody proceeding claims “good

cause” for not transferring the case to a tribal court.

Although “good cause” is not defined under the law,

its meaning is made somewhat clear in the guidelines

for state courts enacted by the Department of the

Interior (44 Fed. Reg. Vol. 44, No. 228, p. 67584 [Nov.

26, 1979]). The guidelines state that a party opposing

a transfer to tribal court has the burden of showing

good cause by clear and convincing evidence.

Examples of good cause grounds to deny a transfer

request include the absence of a tribal court for the

tribe in which the Indian child is a member, an

objection by the Indian child to a transfer (if he/

she is older than age twelve), a history of minimal

contact between the child and the Indian tribe and

reservation, a situation in which the request for

transfer is not timely and the proceedings are at

an advanced stage, and evidence that a transfer

would impose hardship on the parties and witnesses

because of the distance to the tribal court (forum non

conveniens ground).

In addition, some state courts have adopted a

“contrary to the best interest of the child” standard

when deliberating a transfer request—even though

such a standard is not included in the law or

guidelines—and have invoked it as grounds to deny a

transfer when the Indian child has already “bonded”

to his/her foster caretaker(s). (Be aware that some

other state courts have condemned the use of this

standard to deny a transfer.)

MORE PROCEDURES

Whatever the reason, if transfer to a tribal court is

denied and the case remains in state court, various

other procedural protections of ICWA will apply.

For example, a party attempting to achieve the

involuntary foster care placement of an Indian child

must establish, by showing clear and convincing

evidence, that an active effort has been made to

provide remedial and rehabilitative services to the

child’s family and that it was unsuccessful; and

continued custody by the parent or Indian custodian

likely will result in serious emotional or physical

damage to the child.

The latter showing must be supported by the

testimony of one or more “qualified” expert witnesses,

persons who have substantial knowledge of traditional

Indian child-rearing practices or substantial

experience working with Indian children. In states

with small Indian populations, finding such a person

may be problematic, but the alternative—allowing the

child’s future to ride on the opinion of experts who

may be ignorant and, therefore, biased against Indian

parents—is more problematic.

When the petitioning party’s objective is the

termination of parental rights to an Indian child,

the party has the burden of demonstrating beyond

a reasonable doubt that serious emotional or physical

harm will befall the child if parental rights are not

terminated, and that active efforts to provide

remedial and rehabilitative services have been

unsuccessful. Again, the findings must be supported

by the testimony of a qualified expert witness, one

who is versed in the ways of traditional Indian childrearing

practices.

VOLUNTARY PLACEMENTS & ADOPTIONS

In recognition that a substantial number of Indian

children have been removed from their homes under

the guise of “voluntary placements,” ICWA regulates

the voluntary placement of Indian children and the

voluntary termination of parental rights for adoptions.

Its stringent requirements on parties who seek

voluntary placements represent an attempt to abolish

a longtime pattern by many public and private

agencies of abusing the rights of Indian parents.

The act mandates that the valid placement of an

Indian child in foster care or the valid termination

of parental rights requires the consent of the Indian

parent in writing before a judge of competent

jurisdiction (either a state court judge, if the child is

domiciled off the reservation, or a tribal court judge)

who certifies that he/she has explained to the parent

the consequences of his/her actions in a language the

parent understands, or has had the consent translated

into a language the parent understands.

A consent to the termination of parental rights cannot

be executed until after the child is ten days old. If the

consent is not obtained pursuant to the provisions of

ICWA, the termination will not be legal. The party

obtaining custody will be barred from invoking a

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state court’s jurisdiction to further place the child,

and the child will be ordered returned to the parent,

unless returning the child would subject him/her to

immediate danger.

An Indian parent or custodian can revoke his/her

consent at any time during the foster care placement

and before the decree of termination or adoption has

been entered. After doing so, he/she will be entitled

to the automatic return of custody of the child. In the

case of an adoption, however, if the court has already

entered an order accepting the voluntary termination

of parental rights, the parent cannot revoke his/her

consent. In cases where an Indian child has been in

the home of an Indian custodian, not only must there

be a termination of the parental rights, but also a

termination of the custodial rights before the adoption

will be legal.

PLACEMENT PROVISIONS

A second, and equally important, goal of Congress in

enacting ICWA was to ensure the placement of Indian

children in homes that would reflect the unique values

of Indian culture. This was achieved by the placement

provisions of ICWA, which govern both voluntary

and involuntary placements of Indian children and

define placement preferences that public and private

agencies must follow. *(Indian tribes are permitted*

*under ICWA to change the order of the act’s placement*

*preferences, so you must investigate with each tribe you*

*encounter the order of its particular preference scheme.)*

According to ICWA, when an Indian child is placed in

foster care, the placement agency or party must place

the child, in the absence of good cause to deviate,

with (1) a member of the Indian child’s extended

family (including non-Indian members of the family),

(2) a foster home licensed or approved by the child’s

tribe, (3) an Indian foster home licensed or approved

by a non-Indian agency or authority, or (4) an

institution for children that has the approval of an

Indian tribe.

To determine which placement option best meets the

intent of ICWA, the placement agency must consider

the need to approximate the child’s family setting

as closely as possible, to keep the child as near as

possible to his/her family’s home, and to place the

child in the least restrictive environment.

When an Indian child is placed for adoption, ICWA

requires that, in the absence of good cause to deviate,

the child be placed with (1) a member of his/her

extended family, (2) other members of his/her tribe,

or (3) other Indian families. In this situation, too, it is

necessary to determine whether the tribe involved has

altered the standard preference scheme.

In either a foster care or adoption placement, if the

party advocating a deviation from the placement

preferences demonstrates good cause to deviate, the

state court can sanction a placement that does not

conform to the standard placement criteria.

The Department of the Interior’s guidelines for

state courts lists the following as examples of

good grounds to deviate: (1) a request to deviate

that comes from the biological parents or the

child (provided he/she is of “sufficient” age), (2)

extraordinary physical or emotional needs of the child

(as established by qualified expert testimony), and

(3) the determination—after a diligent search for a

family that meets the placement preferences—that a

“suitable” family is not available.

IS IT WORKING?

The standard by which any law should be judged is

whether it has achieved its stated legislative objective.

The Indian Child Welfare Act was enacted to prevent

the continued removal by state agencies, courts, and

private agencies of large numbers of Indian children

from their families and—equally important—their

culture.

At the very minimum, the existence of the act has

brought attention to the unique needs of Indian

children and provided state agencies and judges

with a valuable, cross-cultural educational tool.

Although the removal of Indian children from their

homes continues to occur at an alarming rate, ICWA

mandates a process that, if adhered to over time, will

eventually ensure the survival of Indian tribes and

cultures well into the future.

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**Tribal-State Relations:**

**Promising Practices in Child Welfare**

will assist readers in developing positive Tribal-State

relations in their communities.

NEGOTIATION OF DIFFERENCES IN CHILD

WELFARE VALUES AND PRACTICES

A potential barrier to positive Tribal-State relations

involves the differences that often arise between

State and Tribal child welfare values and practices.

Within Tribal communities, child welfare decisions

often are made based on the concept of *community*

*permanency*. When a child is born into a Tribe, he or

she becomes not just part of the family, but also a

part of the entire community. The meaning of family

in Tribal settings encompasses individuals outside

of the child’s biological parents and siblings and is

often referred to as the child’s extended family. An

AI/AN child’s extended family becomes a reference

point for his or her identity and sense of belonging.

From the Tribal perspective, these concepts of identity

and belonging are central to the idea of permanency

and are considered paramount in decisions

regarding the placement of Indian children. When

family reunification is not an option, therefore, the

Tribal perspective places emphasis on permanency

alternatives that help the child stay connected to his

or her extended family, clan, and Tribe (Cross, 2002).

While Tribal communities consider placements within

the context of the community, mainstream models

often consider placements within the context of

the individual parent and the individual child. For

example, within mainstream society, greater emphasis

is often placed on certain types of permanency, such

as adoption with full termination of parental rights.

In this instance, the connection of the child to his or

her birth family is severed. Many Tribal communities,

on the other hand, do not agree with terminating

a parent’s rights and may instead utilize customary

adoption practices. In a customary adoption, the child

is taken in by a family or community member but still

has the opportunity to have a relationship with his or

Both the United States Congress and Tribal

governments have articulated the importance of

protecting the safety, permanency, and well-being of

American Indian/Alaska Native (AI/AN) children.

Through the Indian Child Welfare Act (ICWA) of

1978, Congress stated that “there is no resource that

is more vital to the continued existence and integrity

of Indian tribes than their children” (25 U.S.C. Sec.

1901). Congress goes on to further assert that “it is

the policy of this Nation to protect the best interests

of Indian children and to promote the stability

and security of Indian Tribes and families by the

establishment of minimum Federal standards for the

removal of Indian children from their families and

the placement of such children in foster or adoptive

homes which will reflect the unique values of Indian

culture . . . ” (25 U.S.C. Sec. 1902).

Providing child welfare services for AI/AN children

routinely involves multiple governments, agencies,

and jurisdictions. In addition, unique historic and

cultural factors play a major role in shaping service

availability, utilization, and effectiveness for Tribal

families and communities. Under ICWA, the Federal

Government has established requirements for State

and private agencies that regulate how placements of

Tribal children and services to Tribal families should

occur. The Administration for Children and Families

(ACF) re-emphasizes these requirements in their

instructions to States regarding the development of

Child and Family Services Plans, issued in April 2005

(ACF, 2005). However, it is not unusual to see Tribal-

State conflicts with regard to the implementation of

ICWA requirements and such issues as notification,

transfer of cases, service provision, placement

preferences, preservation of connections, and

achievement of permanent family outcomes.

This issue brief is intended to help States and Tribes

find ways to work together more effectively to meet

the goals of ICWA. Understanding the principles

of effective practice identified here, along with the

history and context for Tribal-State relationships,

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her biological parents and extended family (Clifford-

Stoltenberg & Simmons, 2004).

These differences in how family, community, and

permanency may be viewed can shape how Tribes

and States work together on child welfare cases and

form the foundation for what is defined as “success”

in achieving permanency for Tribal children. When

States pursue policies or practices that are inconsistent

or inflexible with regard to Tribal values, Tribal-

State relationships are almost certain to suffer.

States that embrace Tribal values, on the other

hand, demonstrate a respect for Native culture and

tradition. This respect can lead to more open, effective

Tribal-State relations. One common mechanism

for expressing this acceptance of Tribal values and

practice is a Tribal-State agreement that allows the

Tribe maximum flexibility permitted under the law

to make decisions that reflect its culture, rather than

imposing a State approach.

Overcoming all of the potential barriers discussed in

this section can be challenging for both Tribes and

States, but many States and Tribes have developed

relationships and strategies to address the needs of

AI/AN children and families. New collaborations

are increasing, and paradigm shifts are occurring

in the thinking of State and Tribal officials that are

transforming relationships in child welfare.

WHAT ARE THE COMPONENTS OF

SUCCESSFUL TRIBAL-STATE RELATIONS?

Tribes and States share common purposes and

common interests. Both entities are concerned with

protecting the health and welfare of their citizens by

effectively and efficiently utilizing public resources,

providing comprehensive programs and services to

their constituents, protecting the natural environment,

and engaging in economic development activities.

States and Tribes are most successful in achieving

better outcomes for children and families when a

positive partnership is established, as demonstrated

through a mutual understanding of government

structures, cooperation and respect, and ongoing

communication.

*Mutual Understanding of Government Structures*

To facilitate strong Tribal-State relations, Tribes and

States begin by developing an understanding of

each other’s governmental structures and processes.

Without this fundamental knowledge, it will be

difficult to identify the most beneficial avenues within

each government for negotiating common interests

related to child welfare (Johnson, Kaufmann, Dossett,

& Hicks, 2000).

Tribes and States wishing to work toward effective

child welfare relationships might begin by seeking

answers to the following questions:

• Who are the appropriate people at both the Tribal

and State levels to discuss child welfare issues

(e.g., Tribal council, State governor, child welfare

director, etc.)?

• How are child welfare program and policy

decisions made within each government?

(Do decisions involve the Tribal council/State

legislature? Who determines membership within

the Tribe?)

• What does the child welfare service delivery

system look like? Who are the key agencies, and

what is their authority and mission? Who is the

service population for each government (e.g.,

all AI/AN people in a given area, or only Tribal

members living on Tribal lands)?

• What is the best process for discussion and

negotiations? Who should be involved, how

will issues be discussed, and how will conflict or

disagreement be addressed?

*Cooperation and Respect*

Once Tribes and States understand how each other’s

governments function, they can further enhance

Tribal-State relations by employing general principles

of good relationships, including cooperation and

respect. Cooperation is a major component of

successful Tribal-State relations. When both Tribes

and States are willing to set aside prior conflicts

(e.g., jurisdictional issues, land claims, water rights,

taxation, etc.), they are more successful in reaching

out to one another to come to agreements on child

welfare issues. This cooperation must be built around

mutual respect and an understanding that each entity

is an independent government operating to serve a

particular population, and that AI/AN families are

citizens of both governments.

States and Tribes are most successful in meeting

Federal requirements and serving the best interests of

AI/AN children when they acknowledge and utilize

the strengths and resources of each government. Tribes

have a large knowledge base that they can share

with States regarding the protection of Tribal children

and the strengthening of Tribal families. Their rich

traditions and cultural practices were the foundation

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for the development of unique approaches that are

among the most successful used in child welfare

today with this population. Safety, permanency, and

well-being of AI/AN children are facilitated by the

ability of the agency providing care to understand

the child’s culture, including his or her perception of

permanency and critical connections with his or her

extended family and Tribe. States that recognize Tribes

as important resources in addressing child abuse and

neglect among AI/AN families have been able to

improve services and outcomes for AI/AN children.

Within Tribal communities, mutual respect is greatly

valued. It is a principle evident in all aspects of Native

life, especially child rearing (Lewis, 1980, as cited

in Cross, Earle, & Simmons, 2000). Mutual respect

involves listening actively to other viewpoints, being

aware of one’s own assumptions, and remaining

open to ideas that may challenge one’s personal

views or experience. In a practical sense, States can

demonstrate respect and understanding by viewing

Tribal governments as a primary resource that can

benefit Tribal children in care. Supporting Tribal

capacity development and practice will ultimately

benefit Tribal families and children.

*Ongoing Communication*

Tribes and States that communicate early and often

are better able to establish mutual understanding

and respect. Often, Tribes and States communicate

only in times of conflict or misunderstanding. To

remedy this reactive situation, mechanisms for

ongoing Tribal-State communication, such as public

and private forums, can be created. In addition to

ongoing communication, it is helpful to establish a

process for frequent review and assessment of policies

addressing Tribal-State relations issues and the

development of recommendations for improvements

in these policies. Many States and Tribes have created

Tribal-State advisory committees in child welfare to

serve as a forum for communication and planning.

In other places, conferences and policy institutes

have been developed by Tribes and States. All of

these efforts have in common a goal of enhancing

communication and institutionalizing successful

processes and practices.

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www.childwelfare.gov/pubs/issue\_briefs/tribal\_state/index.cfm.